Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1869

S & M MATERIALS COMPANY,

Petitioner,

VS.

SOUTHERN STONE COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS

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S & M MATERIALS COMPANY,

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SOUTHERN STONE COMPANY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS

The Petitioner, S & M MATERIALS COMPANY, respectfully prays a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 21, 1980, with an Order denying petition for rehearing being entered on March 25, 1980.

CITATIONS TO OPINIONS BELOW

The Opinion of the Judge of the United States District Court granting summary judgment in favor of the seller, SOUTHERN STONE COMPANY, INC., was unreported,

but is attached herein as Appendix "A". The Opinion of the Fifth Circuit Court of Appeals printed in Appendix "B" hereto, is reported at 612 F2d 198. The final judgment and mandate of the United States Court of Appeals for the Fifth Circuit was issued on April 3, 1980.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit, affirming the grant of summary judgment by the District Court and denying a petition for rehearing, is printed herein as Appendix "A". The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED FOR REVIEW

Is it an absolute requirement in order to qualify as interstate commerce under the Robinson-Patman Act that physical movement of the relevant product across a State line must occur? Or, is it sufficient that the "transaction" crosses the State line as this Court holds in *Gulf Oil Corp. vs. Copp Paving,* 419 U.S. 186, 95 S. Ct. 392?

In determining whether a transaction is in interstate commerce under the Robinson-Patman Act, the Fifth Circuit now holds that physical movement of the relevant product across a State line is an absolute, one hundred percent requirement. Is this so since this is not consistent with this Court's holding in *Gulf Oil Corp. vs. Copp Paving,* supra, which ironically is cited by the Fifth Circuit for holding that it is a mandatory requirement?

STATEMENT OF THE CASE

Petitioner-Appellant, S & M MATERIALS COMPANY, hereinafter referred to as S & M MATERIALS, filed suit against SOUTHERN STONE COMPANY, alleging violations of the anti-trust laws and specifically the Clayton Act, Section 13(a), as amended by the Robinson-Patman Act, Section 2(a).

On May 4, 1979, the United States District Court for the Middle District of Georgia, Columbus Division, granted SOUTHERN STONE's Motion for Summary Judgment, finding a lack of subject matter jurisdiction and a memorandum decision was issued by the Court. That memorandum decision states in pertinent part:

> "It thus appears that there was no sales by the Defendant company which were interstate sales as contemplated by the Robinson-Patman Act."

S & M MATERIALS appealed the dismissal of the cause maintaining there was sufficient evidence in the record of discriminatory interstate sales as that term as contemplated by the Robinson-Patman Act. Other issues were also involved in the appeal but they are not relevant to the instant petition.

The Decision on that appeal was rendered on February 21, 1980, with the United States Court of Appeals for the Fifth Circuit affirming the action of the District Court. That decision is attached hereto as Appendix "B" and states in pertinent part:

> "However anachronistic it may today seem, the cases established that the state of being 'in commerce' under Section 2(a) requires physical movement of the relevant product across a state line."

It is this statement with which S & M MATERIALS takes issue. It is this statement which is the subject of this petition and it is this statement which is not consistent with prior decisions of this Court.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case involves questions of gravity and importance. This case also involves principles the settlement of which is of importance to the general public, farmers and every business entity which conducts business affairs in more than one state.

This case involves conflicts between decisions involving the question of interstate commerce and anti-trust.

This case involves the question of what is required of a business transaction to cause it to be classified as an interstate transaction. It is an absolute, one hundred percent requirement that physical movement of the relevant product across a State line is a must?

This case involves the interpretation of anti-trust legislation. The Courts have repeatedly interpreted that legislation to require that for a cause of action to arise under the Federal anti-trust legislation, and specifically the Robinson-Patman Act, at least one of the transactions involved must be in interstate commerce. The Fifth Circuit has now held that the

commodity involved itself must literally cross state lines. That additional requirement is not supported by any precedent. The effect of that additional requirement is to eliminate from the grasp of anti-trust legislation those organizations which admittedly transact interstate business but cleverly cause the delivery of the commodities involved to be done within their own State, and never outside.

This case involves the question of the scope of the protection afforded by Federal anti-trust legislation.

The decision in the instant case is contrary to the decision of this Court in *Gulf Oil Corporation vs. Copp Paving,* 419 U.S. 186, 95 Supreme Court 392.

The opinion of the Court of Appeals for the Fifth Circuit which has given rise to this petition contains the following excerpt:

> "At the time summary judgment was entered for Appellee, Appellant was unable, despite sixteen months of discovery, to point to a single interstate sale of dolemite rock by Appellee. Although Appellee has sold dolemite rock to foreign buyers . . . ."

The Court continued with the statement which serves as the crux of this petition, namely:

> "However, anachronistic it may today seem, the cases establish that the state of being 'in commerce' under Section 2(a) requires physical movement of the relevant product across a state line."

Anachronistic indeed, the principle is also contrary to this Court's decision in *Gulf Oil Corporation vs. Copp Paving*, 419 U.S. 186.

The Fifth Circuit's decision in the instant case is the first case ever to hold that "Section 2(a) requires physical movement of the relevant product across a state line." That requirement is contrary to this Court's opinion on the same issue, which is:

> "With almost perfect consistency, the Courts of Appeals have read the language requiring that 'either or any of the purchases involved in such discrimination [be] in commerce' to mean that Section 2(a) applies only where 'at least one of the two *transactions* which, when compared, generate a discrimination . . . . . cross[es] a State line.' " *Copp Paving*, 95 Supreme Court 401.

No mention at all is made with regard to a relevant product crossing a State line. The *Copp Paving* case cannot reasonably stand for that proposition, yet, that is the first case cited by the Court of Appeals for the Fifth Circuit to support its unique principle of law.

There are enumerable businesses throughout the nation conducting business across State lines on a daily basis but whose commodity does not cross a State line. They send their agents across a State line and they utilize the telephone and mail service. They bank across State lines and they solicit business across State lines. This Court has held in *Copp Paving* that it is the "transaction" which must cross the State line so as to

satisfy that interstate commerce requirement of the Robinson-Patman Act, Section 2(a).

Now, the United States Court of Appeals for the Fifth Circuit has rewritten that rule. It is no longer, according to that Court, the rule that the transaction must cross the State line, the rule now is that the relevant commodity must be literally picked up and carried across a State line.

With this new and narrow rule, thousands of business transactions which Congrsss intended to be subjected to the protection of the Robinson-Patman Act, and which, up until February 20, 1980, had been subject to that Act, can now participate in precisely the same practices which the Act attempts to prohibit. Now, those once regulated transactions can simply hide behind the shroud of in-state deliveries.

Thousands of small business will no longer be afforded the protection of the Act once provided them, even if a discriminatory business reeks with characteristics of interstate commerce. Now, business may participate in discriminatory practices knowing that as long as their product does not cross a State line, the victim of the discrimination has no recourse, even if every other aspect of their transactions are interstate in nature.

CONCLUSION AND PRAYER

The question presented herein has broad significance to any and every citizen who conducts business.

Congress intended to protect those transactions and businesses from discriminating practices with regard to pricing and this Court has interpreted the law in that area as to require that one of the transactions involved in the discrimination cross a State line. The United States Court of Appeals for the Fifth Circuit has now ruled in the instant case that a narrower requirement applies. Now, the commodity itself must cross a State Line. The two requirements are not consistent.

For these and the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,
GOWER and GUNBY, P.C.

BY: _____

Charles A. Gower, Attorney
for S & M Materials

BY: _____

Stephen G. Gunby, Attorney
for S & M Materials

P O. Box 2148
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PROOF OF SERVICE

The undersigned attorney of record for Petitioner, CHARLES A. GOWER, hereby certifies as follows:

(a) That I, CHARLES A. GOWER, am a member of the Bar of the United States Supreme Court, and that I have duly served all parties with the foregoing Petition for Writ of Certiorari as hereinafter shown:

(b) That the names and addresses of the attorney of record for the adverse party is as follows:

Mr. William B. Hardegree
Hatcher, Stubbs, Land, Hollis
and Rothschild
Attorneys at Law
P. O. Box 2707
Columbus, Georgia 31902

(c) That on this day I served three printed copies of the foregoing Petition for Writ of Certiorari on the same William B. Hardegree, attorney for the Respondent, by depositing same in the United States mail, return receipt requested, properly addressed to said attorney for Respondent at his said address.

EXECUTED, this the 30th day of April, 1980.

Charles A. Gower
Gower and Gunby, P.C.
Attorneys at Law
P. O. Box 2148
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404/324-5685

Sworn to and subscribed before
me this 30th day of April, 1980.

/s/ Carolyn Miller

Notary Public, Muscogee County, Georgia
My Commission expires March 13, 1983.

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

CIVIL ACTION NO. 77-176-COL

S & M MATERIALS COMPANY,

Plaintiff

v.

SOUTHERN STONE COMPANY, INC.,

Defendant

MEMORANDUM AND ORDER ON MOTION
FOR SUMMARY JUDGMENT

This is an action brought under the provisions of the Robinson-Patman Act in which the Plaintiff contends that it has been damaged in that it alleges that the Defendant has made sales of limestone at prices which discriminate against the Plaintiff. The Defendant has filed a motion for summary judgment and the threshold question presented is one of subject matter jurisdiction.

Under the Robinson-Patman Act there must be two sales, one of which is across a state line. All of the discovery which has been completed in connection with this matter makes it clear that the Defendant company is an Alabama operation which did all of its work, mining and selling, in the State of

Alabama. It made all of its deliveries at its plant in Auburn, Alabama either to the customer himself or to common carrier designated by the customer to accept dominion of the goods at the time of delivery at the plant. It thus appears that there were no sales by the Defendant company which were interstate sales as contemplated by the Robinson-Patman Act. Furthermore, numerous decisions which have interpreted the Act have established that the sales which were alleged to be discriminatory must be sales made to competitors. The Plaintiff company operates a hammer mill and crushes limestone into agricultural lime which is used for farming purposes. The discriminatory sale to which the Plaintiff refers was a sale allegedly made by the Defendant to a company which is engaged in the ready-mix concrete business. It is thus apparent that these two companies were not competitors. It is further clearly indicated from the discovery material that the concrete company actually bought the stone from the Defendant company for the purpose of delivering it to the Plaintiff as an accomodation to the Plaintiff, so, instead of being a competitor, the purchaser was actually assisting the Plaintiff.

The Court concludes that subject matter jurisdiction is lacking and that the Defendant's motion for summary judgment should be sustained. The motion is sustained and the Plaintiff's complaint is dismissed.

IT IS SO ORDERED this 4th day of May, 1979.

J. Robert Elliott
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

CIVIL ACTION NO. 77-176-COL.

S & M MATERIALS COMPANY

V.

SOUTHERN STONE COMPANY, INC.

JUDGMENT

Pursuant to the Court's Memorandum and Order on Motion for Summary Judgment filed May 4, 1979, and for the reason contained therein, Defendant's motion for Summary Judgment is sustained.

JUDGMENT IS THEREFORE ENTERED IN FAVOR OF THE DEFENDANT.

This 4th day of May, 1979.

WALTER F. DOYLE, CLERK

BY /s/ Jonnie L. Adams

Jonnie L. Adams
Deputy Clerk

APPENDIX "B"

S & M MATERIALS COMPANY,
Plaintiff-Appellant,

v.

SOUTHERN STONE COMPANY, INC.,
Defendant-Appellee.

No. 79-2336

United States Court of Appeals,
Fifth Circuit.

Feb. 21, 1980.

Appeal from the United States District Court
for the Middle District of Georgia

Before BROWN, HILL and RANDALL, Circuit Judges.

JAMES C. HILL, Circuit Judge:

Southern Stone Co., appellee, owns and operates a dolemite rock quarry in Auburn, Alabama. High transportation costs and the bulky product's low value combine to give appellee a natural monopoly over the supply of raw dolemite rock in the Auburn area. S & M Materials Co., appellant, began life as a wholesaler of agricultural lime, which is derived from dolemite rock. In 1975, appellant decided to integrate backwards, and build a facility in Seale, Alabama for processing dolemite rock into agricultural lime. The decision to locate at Seale - within appellee's natural monopoly area - assumed

that appellee would be a dependable supplier of dolemite rock, as it had theretofore been of agricultural lime. But when appellee learned that appellant was manufacturing agricultural lime and selling it as a horizontal competitor, appellee raised appellant's price - and appellant's price alone - for dolemite rock by slightly less than 50%. Appellant circumvented this action for a time by engaging one Bi-City Concrete Co. secretly to act as a broker, purchasing dolemite rock from appellee (at the normal price) and immediately reselling it to appellant. Appellee soon got wind of this scheme, however, and increased Bi-City's price too.

Claiming that appellee's selective price increases forced it out of business, appellant brought the instant suit under § 2(a) of the Robinson-Patman Act. 15 U.S.C. §13(a)(1976).[1] Following sixteen months of opportunity for discovery, during which time appellee cooperatively responded to appellant's discovery requests, the trial court entered summary judgment for appellee on the ground, *inter alia,* that appellant had adduced no evidence of preferential sales "in commerce." We affirm.

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13 (a) (1976), prohibits persons "engaged in commerce" from "discriminat[ing] in price between different purchasers

---

1. Appellant has seen fit to proceed solely under the Robinson-Patman Act, and does not assert a cause of action under § 2 of the Sherman Act. 15 U.S.C. § 2 (1976). The scope of our decision is, of course, similarly so limited.

of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce," and "where the effect of such discrimination may be substantially to lessen competition or trend to create a monopoly in any line of commerce." The jurisdictional reach of this statute is far less than the commerce clause would allow. In contrast with the Sherman Act, by which Congress exercised "the utmost extent of its Constitutional power in restraining trust and monopoly agreements," *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 558, 64 S.Ct. 1162, 1176, 88 L.Ed. 1440 (1944); *see Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743 & n.2, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976), "the distinct 'in commerce' language of the Clayton and Robinson-Patman Act[s] . . . denote[s] only persons or activities within the flow of interstate commerce - the practical, economic continuity in the generation of goods and services for interstate markets . . .." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195, 95 S.Ct. 392, 398 42 L.Ed.2d 378 (1974). *Accord, United States v. American Building Maintenance Industries*, 422 U.S. 271, 276, 95 S.Ct. 2150, 45 L.Ed.2d 177 (1975). The "in commerce" requirement, moreover, delimits both the universe of "persons" who are subject to the Act and the type of transactions that can constitute a violation thereof. Not the alleged violator, merely, but the discrimination sought to be charged must also involve a transaction "in commerce."

In the instant case, appellee clearly is "engaged in commerce" within the meaning of § 2(a). Appellee regularly accepts orders for agricultural lime from Georgia customers, and loads it onto trucks bound for that state. It is of no moment that the terms of such shipments are free on board appellee's quarry, or that title to the goods may pass in Alabama. The obviously interstate character of appellee's Georgia lime sales cannot be so easily transformed.

But the foregoing conclusion does not end our inquiry, because appellant's antitrust claim does not relate to agricultural lime. The discrimination for which appellant sues involves the quiet different product of dolemite rock, from which lime is made. Section 2(a) applies only to discrimination in price among "commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce." Thus, not withstanding that appellee is itself "engaged in commerce," jurisdiction under the statute depends additionally on the existence of a sale "in commerce" of dolemite rock or a commercially fungible product, *cf. Fred Meyer, Inc. v. FTC,* 359 F.2d 351, 359 (9th Cir. 1966), *rev'd on other grounds,* 390 U.S. 341, 88 S.Ct. 904, 19 L.Ed.2d 1222 (1968), with which appellee's sales to appellant can be compared. And it is here that appellant's case falls down.

At the time summary judgment was entered for appellee, appellant was unable, despite sixteen months of discovery, to point to a single interstate sale of dolemite rock by appellee.

Although appellee has sold dolemite rock to foreign buyers - appellant itself is a Georgia corporation - the domicile of the purchaser is not controlling. However anachronistic it may today seem, the cases established that the state of being "in commerce" under § 2(a) requires physical movement of the relevant product across a state line. *See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974), quoting *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407 F.2d 4 (5th Cir.), *cert. denied,* 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177 (1969); *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1144 (5th Cir.) (en banc), *cert denied,* 414 U.S. 1116, 94 S.Ct. 849, 38 L.Ed.2d 743 (1973); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 208-10 (5th Cir. 1969). So far as the record shows, appellee has never shipped a single dolemite rock, either directly or indirectly, out of the state of Alabama. We think that appellant had ample opportunity to discover the existence, if any, of preferential dolemite rock sales "in commerce," and its failure to do so warranted the entry of summary judgment on appellant's Robinson-Patman claim.

AFFIRMED.

Supreme Court, U. S.
FILED
JUN 8 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

CASE NUMBER 79-1869

S & M MATERIALS COMPANY,

Petitioner

vs.

SOUTHERN STONE COMPANY, INC.,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979, NO. 79-1869

S & M MATERIALS COMPANY, PETITIONER

VS.

SOUTHERN STONE COMPANY, INC., RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In accordance with Rule 40 of the Rules of the Supreme Court of the United States, the following information is provided:

(a)
OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 612 F.2d 198 (5th Cir. 1980).

(b)
JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari, and the jurisdiction of this Court is not challenged by Respondent.

(c)

STATUTES AND REGULATIONS

This petition involves the following statute: Section 2(a) of the Robinson-Patman Act (15 U.S.C.A. §13[a])

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

(d)

QUESTIONS PRESENTED FOR REVIEW

1.

Should the Petition for Writ of Certiorari be denied, or summarily dismissed, for Petitioner's failure either in its statement of the case of elsewhere to specify any facts or combination of facts which constitutes a "transaction" which crosses a state line within the meaning of the Robinson-Patman Act so as to give the District Court jurisdiction over its claim?

2.

In order for the District Court to have subject matter jurisdiction of Petitioner's claim must the the Respondent have made sales of dolemite rock, the undisputed discriminatory commodity, in interstate commerce?

3.

If question 2. above is answered in the affirmative, must the sales cross state lines to be interstate commerce?

4.

If questions 2. and 3. are answered in the affirmative, must the dolemite rock which is the subject of the "transactions" cross a state line?

(e)

STATEMENT OF THE CASE

Petitioner in presenting the questions for review to this Court says that it is sufficient to show subject matter jurisdiction under the Robinson-Patman Act that at least one of the two transactions which, when compared, generate a discrimination crosses a state line. Respondent agrees with this abstract principle but denies its application here. In taking that position Petitioner implies that there was presented for consideration by the District Court and the Fifth Circuit Court of Appeals facts or circumstances as to transactions in commerce which violated the Robinson-Patman Act. Respondent's uncontradicted summary judgment evidence demonstrated the contrary.

Let's examine the facts, or the combination of facts, to see if any constitute a "transaction" which crosses a state line within the meaning of the Robinson-Patman Act.

Respondent mines dolemite rock from a rock quarry in Lee County, Alabama. The stone is thereafter processed at the same location by crushing into various sizes. The only commercial use of dolemite rock known to Respondent is for use in the construction business such as roads, driveways, etc. and for further processing dolemite rock into agricultural lime for soil fertilization purposes (R. 64-67).

All sales of dolemite rock by Respondent are made at its quarry in Auburn, Alabama, where it is loaded on the trucks of

purchasers, including Petitioner. Respondent makes no deliveries of dolemite rock. At no time during the period in question did Respondent make any sale of, or transport for sale, dolemite rock from within the State of Alabama across any state line into any other state. To Respondent's knowledge no purchaser of dolemite limestone transported this commodity in interstate commerce. All dolemite rock purchased by Petitioner was transported in Petitioner's trucks or in those trucks provided by Petitioner from Auburn, Alabama to the Petitioner's place of business in Seale, Alabama where it was processed into agricultural lime. (R.30, 46,64-67). Petitioner does not allege nor claim that any discriminatory sale of dolemite rock took place in the Middle District of Georgia, or otherwise in interstate commerce, nor are any such sales shown or claimed by Petitioner. Petitioner's interrogatory answers and the unrebutted affidavit of Respondent's president demonstrates this (R.30, 46, 64-67).

Petitioner had From December 12, 1977 until January 18, 1979, in excess of one year, to undertake and complete any discovery in support of its claim of interstate "transactions" before Respondent filed its motion for summary judgment. From that date until the Court's order on May 4th, 1979, approximately three and a half additional months, Petitioner requested no discovery informally, sought no discovery formally or under the rules of discovery and did not request the Court to delay entering any order for the purposes of undertaking discovery, etc. in order to demonstrate any interstate sales or transactions in interstate commerce.

Petitioner did not at the trial level, in its appeal to the Fifth Circuit Court of Appeals, nor in its Petition to this Court, set forth, or even allude to, any set of facts or circumstances to show that Respondent made any sale of dolemite rock in interstate commerce or that there was any "transaction" in interstate commerce prohibited by the Robinson-Patman Act.

(f)
SUMMARY OF ARGUMENT

Since the argument of Respondent will not exceed twenty (20) pages in length, no summary of argument will be set forth.

(g)

ARGUMENT AND CITATION OF AUTHORITY

The Petition for Writ of Certiorari is defective and should be denied for the reason that Petitioner utterly fails to describe either by fact or conclusion the "transaction."

The pleadings, interrogatories propounded by Respondent to Petitioner and Petitioner's answers, and the affidavit of Respondent's president in the District Court (R. 30, 46, 64) clearly show that there were no sales of dolemite rock by Respondent in interstate commerce.

A plaintiff in a claimed violation of §13(a) of the Robinson-Patman Act must allege and prove subject matter jurisdiction; i.e. that one of the discriminatory sales be in interstate commerce and to be in interstate commerce, the sale must be made across a state line.

Petitioner has seized upon the word "transaction" as used by the Court in *Gulf Oil Corporation* v. *Copp Paving Co.*, 419 U.S. 186, 42 L.Ed.2d 378, 95 S.Ct. 392 to imply that there is some mysterious activity carried on by Respondent in the sale of dolemite rock which violates the Robinson-Patman Act. Petitioner does not give this Court nor did it give the District Court or the Fifth Circuit Court of Appeals even a hint of its factual claim as to what constitutes such transaction. It is clear that there must be a "sale" in interstate commerce. This Court said in *Copp Paving* at 419 U.S. 195; 42 L.Ed.2d 387 "unless it appears...that at least one of Industrial's allegedly discriminatory sales was made in interstate commerce (§2[a]), Copp's claim must fail."

This Court, after lengthy discussion, considered and rejected the "Nexus to commerce" argument propounded in *Copp Paving* at 419 U.S. 197; 42L.Ed.2d 388, specifically noting the narrow and restrictive language and interpretation of §2(a) of the Robinson-Patman Act. Respondent submits that it is the same "nexus to commerce" approach that Petitioner is taking when it attempts to distinguish "transactions" in interstate commerce from "sales" in interstate commerce, the latter term

requiring the subject matter of the sale to "cross state lines." *Littlejohn* v. *Shell Oil Co.*, 483 F.2d 1140 (1973, 5th Cir.); *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F.2d 203 (1969, 5th Cir.); *Walker Oil Co.* v. *Hudson Oil Co.*,414 F.2d 588 (1969, 5th Cir.); *Hiram Walker, Inc.* v. *A & S Tropical, Inc.*, 407 F.2d 4 (1969, 5th Cir.).

While some of the Fifth Cricuit decisions cited above, at places, use the term "transactions" generically, they use the term "sales" in interstate commerce specifically. *Copp Paving* uses the two terms in the same manner. For instance see *Cliff Food Stores, Inc.* v. *Kroger, Inc., supra* at pages 208 and 209:

> "Under the terms of Section 13(a), however, at least one of the *sales* alleged to be discriminatory must actually be in interstate commerce." (Emphasis added)
>
> That is, ****at lease one of the two *transactions* which, when compared, generate a discrimination must cross a state line." (Emphasis added)

The Statute itself uses the word "purchases."

Respondent originally and has consistently said "sale" in interstate commerce. The District Court said "sale"; the Fifth Circuit said "sale."

> "Thus, notwithstanding that Appelee is itself 'engaged in commerce' the jurisdiction under the Statute depends additionally on the existence of a *sale* 'in commerce' of dolemite rock or a commercially fungible product, cf. *Fred Meyer, Inc.* v. *F.T.C.*, 359 F.2d 351, 359 (9th Cir., 1966); Rev., D. on other grounds, 390 U.S. 341, 88 S.Ct. 904, 19 L.Ed.2d 1222 (1968), with which Appelee's *sales* to Appellant can be compared. And it is here that Appellant's case falls down." (Emphasis added) *S & M Materials Company* v. *Southern Stone Company, Inc., supra.* Division [4] Page 3397.

Even if *Copp Paving* were contra to Respondent's position, which it is not, it is distinguishable on the facts:

> A. Copp's sole claim for jurisdiction was based on the fact that asphalt was used on the interstate highway system (P. 384 L.Ed., Col. 2, L. 16-25).
>
> B. Copp did not claim that Industrial and Sully-Miller made interstate sales (P. 387 L.Ed., Col. 1, L. 22-26).

The holding in *Copp Paving* was simply that the sales to interstate highway contractors were not sales "in commerce as a matter of law" (P. 389 L.Ed., Col. 1, L. 23-28).

The Fifth Circuit in *Littlejohn, (supra), Cliff Food Stores, Inc., (supra), Walker Oil Co., (2704a), Hiram Walker, Inc., (supra)* has unequivocally held that alleged discriminatory sales must cross a state line following the rule made in this Court. *Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231, 95 L.Ed.2d 44 (1951). These cases were cited, approved and adopted by this Court in *Copp Paving*. Petitioner has at no time in the Trial Court, the Fifth Circuit or in this Court set forth any contentions, much less facts, which constitutes even one sale in interstate commerce of the alleged discriminatory product, i.e. dolemite rock.

The Fifth Circuit Court of Appeals in *Walker Oil Co.* v. *Hudson Oil Co. (supra)* which this Court cited with approval in *Copp Paving*, said in Division [1]:

> "In the instant case by the sales by the two retail gasoline stations are local, intrastate retail sales. They are made not to known or specific customers but rather to whatever random purchasers may wander in desiring to purchase gasoline at the set price . . . the sales themselves did not cross a state line and hence are not 'in commerce' within the meaning of the Robinson-Patman Act . . .

> The instant sales were made by merchants who offered their wares for sale to the trade or public at large, after the flow of interstate commerce ended and the goods came to rest within the state."

Judge Brown, a member of the panel for the Fifth Circuit Court of Appeals in the instant case, in a concurring opinion in the *Walker Oil Co.* case recognized that though there may be a repetition of an outworn test, there still is a requirement of "Physical movement in interstate commerce" to satisfy the test of the sale "crossing state lines."

Petitioner misapplies the holding of this Court in *Copp Paving* by lifting from that decision the term "transaction" and attempting to apply that term to something other than "sales." In referring to "transactions in interstate commerce," the Court was clearly referring to "sales in interstate commerce." Petitioner persists in misapplying this term in its argument to this Court to grant Certiorari that:

> "There are enumerable businesses throughout the nation conducting business across State lines on a daily basis but whose commodity does not cross a State line. They send out their agents across a State line and they utilize the telephone and mail service."

This is the same "nexus to commerce" argument that this Court rejected in *Copp Paving*. This Court clearly established in *Standard Oil Co.*, v. *F.T.C. (supra)* that the "sales . . . must have been made in interstate commerce" (273), and refers to the "flow of the product" of the sale.

CONCLUSION

Even if this case involved questions of such gravity and importance to the general public and "businesses throughout the nation . . . who send their agents across a State line and . . . utilize the telephone and mail service" as Petitioner suggests at Page 6 of its brief, this Court has clearly rejected such activity as the test for subject matter jurisdiction under the Robinson-

Patman Act in *Gulf Oil Corporation* v. *Copp Paving (supra)* and *Standard Oil Co.* v. *F.T.C. (supra).*

Even though Petitioner alludes to such activity as sending agents across state lines, utilization of the telephone service, etc. it has failed at any stage of these proceedings to show or set forth any facts or circumstances which it contends constitutes "transactions" in interstate commerce that are involved in this case. For this reason alone, the Petition for Writ of Certiorari should be denied and summarily dismissed.

Additionally the United States Court of Appeals for the Fifth Circuit has not rewritten any rule or adopted any new and narrow rule, as Petitioner suggests at Pages 6 and 7 of its brief. This Court, and the Fifth Circuit Court of Appeals decisions which this Court has approved and adopted have recognized that for sales to cross state lines, the product must at some stage necessarily cross a state line to be in the flow of commerce.

The Petition for Certiorari presents nothing for this Court to review but on the contrary, submits as a basis for subject matter jurisdiction under the Robinson-Patman Act a theory which this Court has long since rejected.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I do hereby certify that I have served Petitioner with three (3) copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari by mailing three copies of same, postage prepaid and properly addressed to Mr. Charles A. Gower, Attorney at Law, P. O. Box 2148, Columbus, Georgia 31902.

This 30th day of May, 1980.

William B. Hardegree

William B. Hardegree

Supreme Court, U. S.
FILED
JUN 18 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM,

NO. 79-1869

S & M MATERIALS COMPANY,
Petitioner,

versus

SOUTHERN STONE COMPANY, INC.,
Respondent,

REPLY BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

Cliff Food Stores, Inc. vs. Kroger, Inc., 417 F 2d 203 (5th Cir. 1969) ---------- 4,7

Gulf Oil Corp. vs. Copp Paving Co., 419 U.S. 186, 95 S.Ct. 392, 42 L Ed. 2d 378 (1974) ---------- 4,6

Hiram-Walker, Inc. vs. A & S Tropical, Inc., 407 F2d 4 (5th Cir.) cert. denied, 396 U.S. 901 (1969) ---------- 4,7

Littlejohn vs. Shell Oil Co., 483 F2d 1140 (5th Cir.) (en banc), cert. denied, 414 U.S. 1116 (1973) ---------- 4,7

S & M Materials Co. vs. Southern Stone Co., Inc., 612 F2d 198 (1980) ---------- 5,6,7, 8,9

REPLY BRIEF OF PETITIONER

In light of the fact that the Respondent, SOUTHERN STONE, has prematurely undertaken to argue the facts of this case at a time when it is only proper to argue the necessity for the Writ of Certiorari, Petitioner, S & M MATERIALS COMPANY, feels it only reasonable to respond to that argument.

SOUTHERN STONE states at Page 5 of its Brief that the instant application should be denied because S & M MATERIALS has not described, for this Court, an interstate transaction. Even though it is obviously unclear to SOUTHERN STONE, S & M MATERIALS understands that the record is not now before the Court and that any cite to the record would be futile. Nevertheless, S & M MATERIALS is compelled to answer SOUTHERN STONE'S comments.

The Fifth Circuit Court of Appeals recognized that SOUTHERN STONE was indeed involved in interstate commerce and, in fact, sold dolemite limestone rock, the relevant product, to foreign buyers:

> "Although Appellee has sold dolemite rock to foreign buyers Appellant itself is a Georgia corporation — the domiclile of the purchaser is not controlling."

The Court further recognized SOUTHERN STONE's blatant intent to destroy S & M MATERIALS through the use of discriminatory pricing:

> "But when Appellee (Southern Stone) learned that Appellant (S & M MATERIALS) was manufacturing agricultural lime and selling it as a horizontal competitor, Appellee raised Appellant's price — and Appellant's price alone — for dolemite rock for slightly less than 50%. Appellant circumvented this action for a time by engaging one Bi-City Concrete Co. secretly to act as a broker, purchasing dolemite rock from Appellee (at the normal price) and immediately reselling it to Appellant. Appellant soon got wind of this scheme, however, and increased Bi-City's price, too."

Bi-City Concrete Co. was also a foreign buyer, having its office and plant in Georgia, SOUTHERN STONE learned that S & M MATERIALS was secretly buying the dolemite rock (at the old price) thru Bi-City Concrete Co., only because SOUTHERN STONE's salesman happened to call on Bi-City Concrete Co. on a routine sales trip. SOUTHERN STONE's salesman crossed the State line (Alabama into Georgia) to call on Bi-City Concrete Co. Bi-City Concrete Co. sent its check across the State line (Georgia into Alabama) to pay for the dolemite rock.

Nothing could be more clearly demonstrate SOUTHERN STONE's manifest intent to run S & M MATERIALS out of business. SOUTHERN STONE succeeded.

This is not simply a game of semantics as SOUTHERN STONE would have the Court believe. Actually, SOUTHERN STONE's somewhat lengthy discussion of interstate "sales" as opposed to "transactions" is

totally unnecessary unless it is to exhibit SOUTHERN STONE's confusion of the question at hand. We are not concerned with any difference, real or imagined, between sales and transactions.

The question to be decided is whether it is absolutely necessary that the "relevant commodity" physically cross a State line before a transaction will be considered interstate commerce within the meaning of the Robinson-Patman Act. This Court has never answered that question. SOUTHERN STONE tries to lead the Court to believe that it has indeed answered that question by a statement made in the next to the last paragraph of SOUTHERN STONE's Brief, but, of course, SOUTHERN STONE is unable to support that assertion with any authority declaring that "the product must at some stage necessarily cross a State line."

What this Court and other Courts of Appeal have said is that one of the transactions or one of the sales must cross a State line. The position, therefore, of S & M MATERIALS in this application is relatively simple.

There are many phases of every sale and every transaction. There is the Seller and there is the Buyer, each of whom, of course, have a domicile. There is the initial solicitation of the order which can involve, as it did in the instant case, salesmen soliciting orders from customers in a State other than the Seller's home State. In the instant case, SOUTHERN STONE sent salesmen to Georgia to solicit orders. On one of these sales trips, SOUTHERN STONE's salesman learned that S & M MATERIALS was secretly buying the dolemite rock (at the old price) from Bi-City Concrete Co. The price to Bi-City Concrete Co. was then immediately raised nearly 50%.

Jurisdiction under the Robinson-Patman Act depends on the existence of a sale "in commerce" of dolemite rock. That is what we have here. What we do not have here is physical movement of the dolemite rock itself across the State line. If the rule is going to be that jurisdiction under the Robinson-Patman Act depends solely on the physical movement of the relevant product across a State line then this Court needs to say just that. As it stands right now, the Fifth Circuit says that is what this Court says is the rule. The Fifth Circuit interprets this Court's ruling in *Gulf Oil Corporation vs. Copp Paving Co.*, 419 U.S. 186, 95 S.Ct. 392, 42 L.Ed. 2d 378 (1974) as saying:

> "However anachronistic it may today seem, the cases establish that the state of being 'in commerce' under Section 2(a) requires physical movement of the relevant product across a State line. See *Gulf Oil Corporation vs. Copp Paving Co.*, 419 U.S. 186, 95 S. Ct. 392, 42 L.Ed. 2d 378 (1974), quoting *Hiram-Walker, Inc. vs. A. & S Tropical, Inc.*, 407 F2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed. 2d 177 (1969); *Littlejohn vs. Shell Oil Co.*, 483 F2d 1140, 1144 (5th Cir.) (en banc), *cert. denied*, 414 U.S. 1116, 94 S.Ct. 849, 38 L. Ed.2d 743 (1973); *Cliff Food Stores, Inc. vs. Kroger, Inc.*, 417 F2d 203, 208-10 (5th Cir. 1969)."

If the cases cited are reviewed, it can be easily seen that the cases just do not say what the Fifth Circuit claims they say. No Court has even gone so far. No Court has ever singled out one component of a business transaction and required that *it alone*, be *the* factor which must be in-

terstate in nature. The decision rendered in *S & M Materials Co. vs. Southern Stone Co., Inc.*, 612 F2d 198 disgresses from all precedence. It stands alone and unsupported in the area of Robinson-Patman decisions.

A look into the extent of this disgression in the law accurately delieniates what the decision has done.

A transaction is undoubtedly comprised of many varied and equally vital component parts. A transaction is truly not a transaction without each and every one of those component parts. There is the initial contact between the buyer and the seller; perhaps in the form of advertising or in the instant case, personal solicitation by agents of the seller. There is the offer and there is the acceptance of the offer. Often, there is between these two phases a series of negotiations, which, themselves, may be interstate in nature, as in the case at bar where negotiations were made via instrumentalities of interstate commerce, namely, the telephone and the United States mail service.

Another phase of a normal "transaction" involves payment. The payment procedure may have interstate qualities in that the request for payment and the actual payment may cross State lines. And, of course, there is the phase of the transaction which involves delivery of the goods. This is the phase which has been immortalized by the Fifth Circuit in *Southern Stone*, supra.

The decision has, in essence, established the completely novel legal principal that regardless of the overpowering "interstate" nature of the various phases of a transaction and regardless of whether a majority of the phases of the transaction crosses a State line, if the relevant product

does not literally travel across a State line, there is no interstate transaction at all. That principal is not supported by any prior decision of the Fifth Circuit or the United States Supreme Court. The *Southern Stone* decision has rewritten the law so as to make one phase of a transaction, and that phase alone, determinative of the interstate character of the transaction as a whole.

The decision in *Southern Stone* cites several cases in support of its "new law" but upon analysis it can be readily observed that the cases cited to not support the Court's decision. The cases do not establish that the state of "being in commerce under Section 2(a) requires physical movement of the relevant product across a State line."

Gulf Oil Corporation vs. Copp Paving, 419 U.S. 186, 95 S. Ct. 392 (1974), in no way indicates that the relevant product must itself cross a State line. That decision alines itself with other relevant decision by holding that the *transaction* must cross a State line.

> "With almost perfect consistency, the Courts of Appeals have read the language requiring that 'either or any of the purchases involved in such discrimination be in commerce' to mean that Section 2(a) applies only where 'at least one of the two *transactions* which, when compared, generate a discrimination . . . cross[es] a State line." (Emphasis supplied.)

No mention at all is made in regard to a relevant product crossing a State line. The *Gulf Oil* case cannot reasonably stand for that principle. It is not even addressed as an issue by the Court.

The same holds true for *Hiram-Walker, Inc. vs. A & S Tropical, Inc.* 407 F2d 4(5th Cir. 1969), the case from which the Court in *Gulf Oil* quoted:

> "At least one of the two transactions which when compared, generate a discrimination, must cross a State line." *Hiram-Walker,* at 9.

Another case cited by the Court in the *Southern Stone* decision in support of its opinion is *Littlejohn vs. Shell Oil Co.*, 483 F2d 1149 (5th Cir. 1973), but in actuality this case does not support the Court's position at all. It states, quoting from *Hiram-Walker:*

> *"At least one of the two transactions which when compared, generate a discrimination, must cross a State line."*

And lastly, the Court cites Cliff Food Stores, Inc. vs. Kroger, Inc., 417 F2d 203 (5th Cir. 1969). That case as well does not support the Fifth Circuit's opinion. It states, quoting from *Hiram-Walker:*

> "At least one of the two transactions which when compared, generate a discrimination, must cross a State line."

In the transactions which are the bases for the case at bar, enumerable facets of the transactions were engulfed in characteristics of interstate commerce.

S & M MATERIALS was a Georgia corporation with its principal place of business in the State of Georgia. Bi-City Concrete is a Georgia corporation with its principal place of business in the State of Georgia. SOUTHERN STONE, of course, is an Alabama corporation with its principal place of business in the State of Alabama.

The telephone and United States mail service were both used by SOUTHERN STONE and its agent to negotiate the sales to Bi-City Concrete and S & M MATERIALS. SOUTHERN STONE even sent one of its salesmen to Georgia, from Alabama, to solicit business and customers.

After the sales were made, even the payment for those sales had qualities of interstate commerce. Payment traveled from the Georgia customers across the State line to the Alabama seller.

Reason dictates that in a transaction such as this, where all aspects, save one, of the transactions have interstate characteristics, that the transaction, as a whole, should be considered a transaction which crosses a State line. That is precisely what the outcome would be if the principal of stare decisus were followed here. However, the Fifth Circuit in *Southern Stone* rules otherwise, The Fifth Circuit decision has developed a new and narrower rule.

The new rule requires that you first disregard all phases of the transaction except for the delivery of the product. Under the new rule, delivery is the only phase with which you are concerned. If delivery of the product is made across the State line, the transaction is interstate commerce. If delivery does not cross the State line, the transaction is not interstate commerce.

S & M MATERIALS does not take issue with any of the cases cited by the Fifth Circuit or the rules they stand for. S & M MATERIALS is simply pointing out to the Court that not a single one of those cases can by any stretch of the legal imagination support the Fifth Circuit rule in this case, that it is absolutely necessary that the relevant product literally cross a State line in order that the entire transaction be considered interstate commerce for the purposes of the Robinson-Patman Act.

Logically, one would consider all phases of the business transaction or sale and determine if, as a complete transaction, that transaction has more interstate characteristics than it has local characteristics. That is the only reasonable interpretation of the rule that a "transaction" or "sale" must cross a State line. Yet, the Fifth Circuit Court of Appeals has now said that you do not consider the transaction or sale as a whole but rather you look only to a single element of that transaction, the delivery phase, and if that phase is interstate in nature, there is an interstate sale. The Fifth Circuit has diverted from the rule as it has developed over the years and pronounced that it is not the transaction or sale which must cross a State line, it is now the delivery of the relevant commodity which must cross.

That is the core of the issue here. This Court needs to lend it guidance to the discord which has arisen between the cases precedent and the instant case. Only this Court can revive the uniformity which is so desperately needed.

CONCLUSION

The Fifth Circuit Court of Appeals has developed a rule which can be found in no case precedent. As a result of the lack of precedent, there is discord in the rule as stated by the Fifth Circuit and the rule as stated in other Courts of Appeals and this Court. The granting of the Writ of Certiorari will give this Court an opportunity to decide once and for all whether it is this Court's rule or whether it is the rule as established by the Fifth Circuit which is controlling in litigation under the Robinson-Patman Act.

It is for these and the foregoing reasons that the Petitioner respectfully requests this Court to grant its application for a Writ of Certiorari so that these issues may be settled once and for all.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that I have this date served three printed copies of the within and foregoing Reply Brief of Petitioner upon William B. Hardegree, attorney for Southern Stone Company, Inc. by depositing same in the United States mail, return receipt requested, properly addressed to said attorney for Respondent at his said address.

This the 6th day of June, 1980.

Charles A. Gower, Attorney for
S. & M Materials Company